Abdul Karim bin Pak Kub & Anor v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO A-05-39 OF 1994
SHAIK DAUD, MAHADEV SHANKAR JJCA AND ABDUL MALEK AHMAD J
26 OCTOBER 1995

Criminal Law *— Dangerous Drugs Act — Section 2 — Definition of cannabis — Cannabis as defined under the Act — Whether chemist was referring to 'cannabis' within s 2 or 'cannabis (Indian Hemp)' under the First Schedule — Dangerous Drugs Act 1952 s 2*

Criminal Law *— Dangerous Drugs Act — Section 39B(1)(a) — Trafficking in dangerous drugs — Cannabis — Whether chemist was referring to 'cannabis' or 'cannabis (Indian Hemp)' — Evidence of trafficking not challenged — Whether charge of trafficking in cannabis was proved beyond a reasonable doubt — Dangerous Drugs Act 1952 ss 2, 12(2), 37(da) & 39B(1)(a)*

The appellants were convicted under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') by the High Court of trafficking in cannabis and sentenced to death. The appellants appealed, arguing that there was doubt as to what was the substance analysed by the chemist because the chemist merely testified that he found the substance to be cannabis as defined under the Act. It was submitted that since the chemist did not specifically mention that the cannabis was as defined in s 2 of the Act, it could well be cannabis (Indian Hemp) as listed in Pt III of the First Schedule to the Act. Thus, the appellants argued that the court should substitute the conviction for one under s 12(2) of the Act.

Held, dismissing the appeal:

(1) Cannabis was defined only in s 2 of the Act and cannabis (Indian Hemp) was nowhere defined in the Act. Therefore, when the chemist said the cannabis was as defined in the Act, he must have had in mind the cannabis as defined in s 2 of the Act (see p 115I); *Abdullah bin Yaacob v PP* [1991] 2 MLJ 237 followed.

(2) In this case, the prosecution had successfully presented actual evidence of trafficking. Therefore, even if the construction most favourable to the appellants was taken as to the type of drug in this case, ie cannabis (Indian Hemp), in the light of the uncontroverted evidence of actual trafficking, the appellants were rightly convicted under s 39B(1)(a) of the Act (see p 117A–B); *Shukri bin Mohamad v PP* [1995] 3 MLJ 229 distinguished.

[Bahasa Malaysia summary

Perayu-perayu disabitkan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') oleh Mahkamah Tinggi kerana mengedar ganja dan dijatuhkan hukuman mati. Perayu-perayu membuat rayuan,

menghujahkan bahawa terdapat keraguan berkenaan dengan jenis bahan yang dianalisis oleh ahli kimia kerana ahli kimia hanya memberikan keterangan bahawa beliau mendapati bahan itu adalah ganja seperti yang ditafsirkan di bawah Akta tersebut. Adalah dihujahkan bahawa oleh kerana ahli kimia tidak menyebut dengan khususnya bahawa ganja itu adalah seperti yang ditafsirkan di dalam s 2 Akta tersebut, ianya boleh jadi ganja (Hemp dari India) seperti yang disenaraikan dalam Bah III Jadual Pertama Akta tersebut. Oleh itu, perayu-perayu menghujahkan bahawa mahkamah sepatutnya menggantikan sabitan itu dengan sabitan di bawah s 12(2) Akta tersebut.

Diputuskan, menolak rayuan:

(1) Ganja ditafsirkan hanya dalam s 2 Akta tersebut dan ganja (Hemp dari India) tidak ditafsirkan di mana-mana dalam Akta tersebut. Oleh itu, apabila ahli kimia menyatakan bahawa ganja itu adalah seperti yang ditafsirkan dalam Akta tersebut, mesti ada dalam pemikiran beliau bahawa ganja itu adalah seperti yang ditafsirkan dalam s 2 Akta tersebut (lihat ms 115I); *Abdullah bin Yaacob v PP* [1991] 2 MLJ 237 diikut.

(2) Dalam kes ini, pihak pendakwa telah berjaya mengemukakan bukti sebenar pengedaran. Maka, jika pun pentafsiran yang berpihak kepada perayu-perayu diambil berkenaan dengan jenis dadah dalam kes ini, iaitu ganja (Hemp dari India), berdasarkan bukti pengedaran sebenar yang tidak dipertikaikan, perayu-perayu telah disabitkan dengan betul di bawah s 39B(1)(a) Akta tersebut (lihat ms 117A–B); *Shukri bin Mohamad v PP* [1995] 3 MLJ 229 dibeza.]

Notes

For cases on the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 30–233.

Cases referred to

Shukri bin Mohamad v PP [1995] 3 MLJ 229 (distd)
Abdullah bin Yaacob v PP [1991] 2 MLJ 237 (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 12(2), 37(d), 37(da)(vi), 39(B)(1)(a)
Dangerous Drugs (Amendment) Act 1980

Appeal from: Criminal Trial No PCT 58–15–92 (High Court, Taiping)

Karpal Singh (*Karpal Singh & Co*) for the appellants.
Azahar Mohamed (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult A

Shaik Daud JCA (delivering the judgment of the court): Both the appellants were convicted by the Taiping High Court of trafficking in dangerous drugs, to wit, 3,503gms of cannabis on 25 May 1992 at about 3.20pm at Batu 108 Air Krai, Kerunai, Gerik, Perak and accordingly sentenced to death. B

Originally they were acquitted and discharged by the same court without their defence being called when the court held that there was a doubt on what was the substance found on them. This was because the chemist when giving evidence said that the substance he analysed was 'cannabis' as defined in the Dangerous Drugs Act 1952 ('the Act'). Firstly, C the court held that the chemist in testifying that the substance was cannabis, which evidence was unsupported by other credible evidence, had failed to state how he arrived at that conclusion. In other words, the court was of the view that the chemist merely said that the substance was cannabis without giving any reasons thereof and without itemizing the actual tests D undertaken by him. Secondly, the court held that the chemist merely said that the substance was cannabis as defined in the Act, without referring to any particular section. The court held that it is incumbent on the prosecution to lead evidence through the chemist to establish beyond reasonable doubt that the subject matter of the charge was in fact cannabis within the meaning of s 2 of the Act. E

The Public Prosecutor, not being satisfied with the acquittal, appealed to the then Supreme Court. After hearing arguments, the Supreme Court had remitted the case back to the High Court and had ordered that the defence be called. This could only mean that the Supreme Court had rejected the High Court's finding on this issue. The High Court, as F directed, heard the defence and came to the conclusion that the defence, being a mere denial, had failed to rebut the presumption under ss 37(d) and 37(da)(vi) of the Act and accordingly convicted both the appellants.

Although several grounds were put forward in this appeal, Mr Karpal Singh appearing for both the appellants relied and argued only on one G ground, ie that there is doubt as to what the substance analysed by the chemist was. This is because the chemist merely said that he found the substance to be cannabis as defined under the Act. He submitted that since the chemist did not specifically mention that the cannabis was as defined in s 2 of the Act, it could well be cannabis (Indian Hemp) as listed in Pt III of the First Schedule to the Act. In support of his submission, he H cited a recent decision of the Federal Court which was delivered on 9 October 1995. It is the decision in *Shukri bin Mohamad v PP* [1995] 3 MLJ 229. Based on this decision, he had urged this court to substitute the conviction for one under s 12(2) of the Act, as was done in *Shukri*'s case.

I

In *Shukri*'s case, the appellant was similarly convicted for an offence under s 39(1)(a)of the Act for trafficking in 36kg of cannabis and was sentenced to death. The facts show that during the trial, as in this case, the chemist had described the drug as 'cannabis as defined in the Dangerous Drug Act 1952' and not 'cannabis as defined in s 2(1) thereof'.

A The Federal Court held (at pp 232 and 234):

> The glaring omission by the chemist to refer to s 2(1) of the Act could give rise to the inference that he did not have in mind the ingredients of cannabis as defined therein ... . His testimony is open to the construction that the plant material examined by him was either 'cannabis' within the meaning of s 2 of the Act or that it was 'cannabis (Indian Hemp)' listed in Pt III of the
> B First Schedule of the Act, *though nowhere defined in the Act.* (Emphasis added.)

The Federal Court also came to the conclusion that in the context of the relevant legislation, being found in possession, custody or control of 'cannabis (Indian Hemp)' without the necessary authorization, is an offence
C under s 12(2) of the Act, punishable under s 12(3) thereof. The court held further that it follows that 'cannabis' and 'cannabis (Indian Hemp)' even though of the same weight, may not be the same thing, as they may constitute the subject matter of different offences which may be differently penalized, and it follows that the *presumption under s 37(da) cannot arise* in
D that case.

The Federal Court then allowed the appeal, quashed the conviction and sentence and substituted it with a conviction under s 12(2) of the Act and sentenced the appellant to five years' imprisonment.

The learned deputy public prosecutor, En Azahar bin Mohamed
E (who incidentally also appeared for the public prosecutor in *Shukri*'s case), while conceding that the nature of the evidence in the present appeal is similar as in *Shukri*'s case, urged upon this court that *Shukri*'s case is distinguishable. Before going into this aspect of the DPP's submission, it is, I think, pertinent to also consider another similar case decided by the (then) Supreme Court which decision, to my mind, is also binding on this
F court. In *Abdullah bin Yaacob v PP* [1991] 2 MLJ 237, the appellant was also convicted for trafficking 536gms of ganja. One of the issues was whether it is sufficient that the evidence given by the chemist that the substance examined and analysed by him was ganja, but did not say that it was ganja as defined in s 2 of the Act. The court held (at p 239) that it
G is not sufficient for the chemist to say that the substance was ganja, but there must be evidence confirming that it is ganja as defined under the Act. The court then referred to the chemist report which says that the cannabis was as defined in the Dangerous Drugs (Amendment) Act 1980 without alluding to any particular section. From this, the court came to the conclusion that there was no doubt raised that the exhibit examined and
H analysed by the chemist was ganja according to the requirement of the Act. From this, it seems clear to us that what the court is trying to say is that as long as there is evidence by the chemist that the exhibits examined and analysed is ganja as defined in the Act, it is sufficient without alluding to any particular section. Therefore, when the chemist says that the ganja is
I as defined in the Act, this can only mean one thing, and that is as defined in s 2 of the Act. Cannabis is defined only in s 2 of the Act. We think this is the only sensible construction, as cannabis (Indian Hemp) is nowhere defined in the Act. Therefore, when the chemist says the cannabis is as defined in the Act, he must have in mind the cannabis as defined in s 2 of the Act. The fact that cannabis (Indian Hemp) is nowhere defined in the

Act is even accepted by the Federal Court in *Shukri*'s case. Therefore, if cannabis (Indian Hemp) is nowhere defined in the Act, and cannabis is defined in s 2 of the Act, then, when the chemist says the substance cannabis is as defined in the Act, it can only mean one thing.

All these differences may not be necessary or relevant if we now consider the learned DPP's submission that *Shukri*'s case is distinguishable from the present case on appeal. On a careful reading of the judgment in *Shukri*'s case, it becomes very obvious that the court was concerned with the presumption under s 37(da) of the Act. The facts in *Shukri*'s case shows that he was held to be in possession of some 36kg of the cannabis. Therefore, the presumption under s 37(da) arises that 'he shall be presumed, until the contrary is proved, to be trafficking in the said drug'. Therefore, on the facts of *Shukri*'s case, the definition of the cannabis becomes a very important issue. It must be determined beyond reasonable doubt what the drug was. If the drug concerned was cannabis as defined in s 2 of the Act, then, s 37(da) applies, and he ought to be charged under s 39B(1)(a) of the Act. On the contrary, if the drug found in his possession is not cannabis as defined in s 2 of the Act, then, in the words of the Federal Court in *Shukri*'s case, 'the presumption under s 37(da) cannot arise'. Bearing this very important distinction in mind, it is submitted by the learned DPP that in the present appeal, the prosecution and eventually the court need not rely on the presumption under s 37(da) of the Act. This is not a case of mere possession. He submitted that in the light of the wide definition of trafficking, the prosecution in the present appeal had successfully presented actual evidence of trafficking. It has not been challenged that the prosecution had adduced evidence of the agent provocateur, admissible under s 40A of the Act, of the meeting with the appellants, the negotiations for the sale and purchase of the drug, and finally the actual purchase thereof. All this evidence, without doubt, establish the act of trafficking. Trafficking is defined under the Act to include buying, selling, giving, receiving, transporting, carrying, sending, delivering, etc and once that is proved, there is no necessity to invoke the aid of the presumption under s 37(da) of the Act. It cannot be denied that the presumption would only be invoked when there is no evidence whatsoever of actual trafficking, and when the prosecution is solely relying on the evidence of possession, custody or control. In the light of the definition of trafficking under the Act, it would appear that in theory, where there is evidence of actual trafficking, even in one gramme of any dangerous drug, whether defined in s 2 or as listed in the Schedules, it is trafficking under s 39B (1)(a) of the Act. Of course, in practice, it would not be conscionable to charge anyone with trafficking in one gramme of dangerous drug even when there is evidence of actual trafficking. Therefore, on the facts of the present case and in the light of the overwhelming evidence of actual trafficking of the dangerous drug, even though it may well be cannabis (Indian Hemp), the appellants were rightly convicted of trafficking. If the appellants were found to be merely in possession, custody or control of the 3,503gms of the drug which, if it turns out to be cannabis (Indian Hemp), then it follows that the presumption under s 37(da) cannot be invoked

against them. This is also recognized by the Federal Court in *Shukri*'s case. Even if the construction most favourable to the appellants is taken as to the type of drug in this case, ie cannabis (Indian Hemp), in the light of the uncontroverted evidence of actual trafficking, it is our view that they were rightly convicted under s 39B(1)(a) of the Act. Their defence being merely a total denial found no favour with the learned judge. Having gone through the defence ourself, we have no hesitation in agreeing with this finding. Giving the case our best consideration, we would agree with the submission of the learned DPP that *Shukri*'s case is distinguishable, and therefore has no application in the present case. We would therefore hold that in the circumstances of this case, the conviction of both the appellants was justified and correct and their appeals both against conviction and sentence are accordingly dismissed.

Appeal dismissed.

Reported by Jafisah Jaafar